

## **CHAPTER 10**

### **ENFORCEMENT ACTION PROCEDURES**

#### **SECTION 10.1 - GENERAL INFORMATION**

PHMSA's enforcement procedures for preparation and initiation of civil penalty and other actions are found in 49 CFR, Part 107, Subpart D, Sections 107.301-339. Included in Section 107.310 is the ticketing program, which will be discussed in detail in Chapter 14. This chapter of the Operations Manual will focus on the investigator's involvement in the enforcement process.

#### **SECTION 10.2 - COMPLIANCE ORDERS AND CIVIL PENALTIES**

PHMSA's Associate Administrator for Hazardous Materials Safety (AAHMS) and the Office of the Chief Counsel (PHC) has the authority to take action for knowing violations of the Hazardous Materials Regulations. The AAHMS has authority to issue sanctions including advisory letters, warning letters, and tickets, and has delegated this authority to Field Operations. PHC has the delegated authority to issue compliance orders and/or civil penalties.

#### **SECTION 10.2.1 - NOTICE OF PROBABLE VIOLATION**

If, following an inspection or under other circumstances, the Director, Field Operations or designee believes that a person has committed substantive and/or serious violations of the HMR, these will be referred to PHC for action. PHC receives a case referral and assigns it to an attorney. The attorney will contact the investigator and confer about the case asking questions, clarifying issues, and could possibly request additional information and/or documentation. Investigators will assist the PHC attorneys, and should contact their Supervisor regarding any issues concerning this process.

After review and clarification of the referral package, the attorney prepares and issues a Notice of Probable Violation (NOPV). This is the basic document used by PHMSA to bring civil penalty enforcement actions. The NOPV provides information about the violations, the maximum penalties authorized, and the penalties proposed by PHMSA. It also describes the courses of action available to the respondent.

If the NOPV also proposes a compliance order, the NOPV will include a statement of the proposed actions to be taken by the respondent to achieve compliance. When an NOPV is issued, violations are only allegations and that the penalty is only proposed. The case could still be modified or even withdrawn, if subsequent facts warrant it.

The respondent has 30 days to respond to the NOPV and has three choices: pay the penalty, submit an informal response, or request a formal hearing before an Administrative Law Judge (ALJ). If the respondent pays the penalty, the investigator will have no further involvement in the case, which is closed out by PHC. Requests for ALJ hearings will be discussed in Section 10.2.3.

If the respondent elects to submit an informal response, the respondent may submit a written response to PHC, request an informal conference, or both. If a written informal response is submitted, the attorney will provide a copy to the investigator for evaluation and input. This will normally be accomplished via e-mail or a telephone call.

#### SECTION 10.2.2 - CONFERENCE

If an informal conference is scheduled, the investigator and the attorney shall arrange to talk about it in advance, and will go over any major issues that might arise. Informal conferences are usually conducted over the telephone; occasionally they will be conducted face-to-face.

The attorney is the moderator of an informal conference and shall lead the discussion. Investigators are present to provide factual statements about the inspection itself and to address statements made by the respondent about the inspection or any other matter of which you are aware. The investigator and the attorney will conduct a post-conference debriefing to go over the conference and any issues needing resolution.

#### SECTION 10.2.3 - ADMINISTRATIVE LAW JUDGE HEARINGS

If a respondent requests an ALJ hearing, PHC in consultation with the Director of Field Operations will determine whether or not there is a genuine issue of material fact or law. Before making a formal request for the services of an ALJ, PHC will attempt to resolve the issues informally. If this cannot be accomplished, then PHC will request an ALJ and the parties will prepare for a hearing.

The Investigator's role in a hearing is largely the same as in an informal conference, except that they may be called to appear as a witness for the government and testify under oath. In the event that a hearing is scheduled, the attorney shall inform the investigator of the specific requirements and procedures.

#### SECTION 10.2.4 - ORDER

Following the evaluation of an informal response, the information provided in an informal conference, or the testimony in an ALJ case, an Order will be issued formally finding that violations have or have not occurred and assessing a civil penalty and/or compliance order.

An Order issued after the informal process is issued by the Chief Counsel. The respondent has two alternatives in response to an Order, pay the civil penalty or appeal the decision. The investigator's involvement in a case normally concludes with the issuance of an Order.

#### SECTION 10.2.5 - APPEAL

A respondent may elect to appeal an Order in accordance with the Administrative Procedures Act. The appeal is directed to the PHMSA Administrator. In the case of an Order issued by an ALJ, PHMSA may also appeal the decision. A case involving an appealed Order will be assigned to the Adjudication Attorney who represents the Administrator and conducts an independent review of the entire case file.

Investigators will only be involved in an appeal if requested by PHC if the respondent is challenging material facts or issues related to the inspection or other matters which directly involve the investigator. Otherwise, PHC will provide the Enforcement Division an information copy of the respondent's appeal.

The Administrator's decision in an appealed case is called an Action on Appeal. The Administrator may uphold the Order, modify the order by eliminating violations and/or reducing the assessed penalty, or may dismiss the case entirely. If the violations are not dismissed, the respondent may either pay the penalty or file an appeal to the United States Court of Appeal or the District in which respondent resides.

#### SECTION 10.3 - CRIMINAL PENALTIES

Investigators may encounter a situation which involves very serious violations of the regulations and apparent willful intent on the part of the violator. In such situations, PHMSA has the discretion to initiate a criminal investigation and request involvement of the Department of Transportation's Inspector General.

Field Operation and PHC leadership will work together to decide on a course of action for a criminal investigation. Investigators will participate in the development of actions plans and will receive instructions regarding how to proceed.

#### SECTION 10.4 - INJUNCTIVE ACTION

The PHMSA Administrator may seek relief from the Department of Justice for persons engaged in or about to engage in any act or practice involving a violation of the Federal hazardous materials transportation law or regulations issued there-under. This relief could be in the form of mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

Relief of this type would most often be sought when PHC determines that there is a substantial likelihood that death, serious illness, or serious personal injury will result from the

transportation of particular hazardous material or hazardous materials container. Such a situation is usually termed to be an imminent hazard situation. Relief could be sought prior to any other action or proceeding to reduce the risk of harm of the situation.

Be alert during field activities to the possibility of such events and report them to the region supervisor immediately if believed such a situation to exist. PHC and field leadership will provide guidance and direction to you as necessary in the event of such a situation.

### SECTION 10.5 - PENALTY GUIDELINES

Investigators will review the penalty guidelines and appendix the end of Subpart D of Part 107, and be familiar with both their theory and application.

Figure 10.1

### RISK ASSESSMENT MATRIX

Frequency of Occurrence Categories	Consequence of Occurrence Categories				
	(I) Catastrophic	(II) Critical	(III) Marginal	(IV) Minor	(V) Negligible
(A) Frequent	(IA) U	(IIA) U	(IIIA) U	(IVA) C-MDR	(VA) A-MRR
(B) Probable	(IB) U	(IIB) U	(IIIB) C-MDR	(IVB) A-MRR	(VB) A-MRR
(C) Occasional	(IC) U	(IIC) C-MDR	(IIIC) A-MRR	(IVC) A-MRR	(VC) A
(D) Remote	(ID) C-MDR	(IID) A-MRR	(IIID) A-MRR	(IVD) A	(VD) A
(E) Improbable	(IE) A-MRR	(IIE) A-MRR	(IIIE) A	(IVE) A	(VE) A

**RISK INDEX:**

IA,IB,IC,IIA,IIB,IIIA	U	UNACCEPTABLE
ID,IIC,IIB,IVA	C-MDR	CONDITIONAL - MANAGEMENT DECISION REQUIRED
IE, IID, IIIC, IVB, IVC VA, IVB, VB,	A-MRR	ACCEPTABLE - MANAGEMENT REVIEW REQUIRED
IIIE, IVD, IVE, VC, VD, VE	A	ACCEPTABLE